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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

HOTEL CONQUISTADOR, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINIONS BELOW

The opinion of the Court of Claims (App. A, *infra*, 1a-21a) and the order modifying its opinion (App. B, *infra*, 22a-23a) are not yet reported.

JURISDICTION

The judgment of the Court of Claims (App. C, *infra*, 24a-25) was entered on July 13, 1979. By

order dated October 2, 1979, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the value of meals furnished to employees on a daily basis is taxable as "wages" under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, and thereby includable in the benefits base under the old-age and benefits provisions of the Social Security Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 3101, 3121, 3301, and 3306 of the Internal Revenue Code of 1954 (26 U.S.C. (1970 ed.)) and of Treasury Regulations on Employment Tax, Sections 31.3121(a)-1 and 31.3306(b)-1 (26 C.F.R.) are set forth in Appendix D, *infra*, 26a-30a. The pertinent provisions of the Social Security Act (42 U.S.C. (1970 ed.) 405, 409, 1302) and the Regulations on Federal Old-Age Survivors and Disability Insurance (20 C.F.R. 404.1026) are set forth in Appendix E, *infra*, 31a-33a.

STATEMENT

1. Respondent operates a hotel and a gambling casino in Las Vegas, Nevada (App. A, *infra*, 1a). In 1971, the year in issue, respondent's labor agreements with many of its union employees required it

to furnish them at least one free meal during each workday (App. A, *infra*, 2a; Stip. paras. 5, 13; see, *e.g.*, Stip. Ex. 1, at 25). If respondent did not furnish the required free meal, the contract specified that the employee was to be compensated at the rate of $1.25 for each meal not furnished (*e.g.*, Stip. Ex. 1, at 25; App. A, *infra*, 3a). Respondent also furnished at least one free meal per working day to certain full-shift union workers whose contracts did not require free meals, and to certain nonunion, nonaccounting clerical personnel (Stip. paras. 7, 8, 10, 11; App. A, *infra*, 2a). The wages of each employee who received the free meals in question did not exceed $7,800 per year (excluding the value of the meals)[1] (App. A, *infra*, 2a). Most of these employees were maids, maintenance personnel, waiters, waitresses and casino dealers (Stip. para. 18).

Respondent furnished the meals to its employees in a basement cafeteria (App. A, *infra*, 2a; Stip. para. 9, 23). In 1971, it served approximately 1,193 such meals per day to its employees (Stip. para. 3). If the meals were valued at $1.25, they would have constituted an average of 8.3% of the employees' gross wages (App. A, *infra*, 4a-5a). The union contracts

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[1] In 1971, the maximum amount of "wages" subject to FICA (*viz.*, Social Security) taxes was $7,800, and the maximum wages subject to FUTA taxes was $3,000. 26 U.S.C. (1970 ed.) 3121(a)(1), 3306(b)(1). Thus, any person earning more than $7,800 (excluding the value of the free meals in dispute) received $7,800 in concededly taxable remuneration, so that his receipt of free meals would not affect the FICA or FUTA liability in any event.

provided that the meals had to be comparable in quality to those served to hotel customers, with a variety of items, including at least two meat entrees (App. A, *infra*, 2a; see, *e.g.*, Stip. Ex. 1, at 24).

Apart from the union contract obligations, respondent provided the free meals to most of its employees because it recognized that the meals were helpful in attracting employees and encouraging them to continue their service (App. A, *infra*, 2a; Stip. para. 14). The fact that the meals were served on the premises also reduced to a minimum the amount of time that employees would need for on-duty meals (App. A, *infra*, 2a; Stip. para. 14).[2]

For 1971, respondent paid Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes on the value of the meals furnished to its employees, reporting its liability on the basis of a value of 45 cents per meal. It also remitted the additional FICA taxes withheld from its employees on that basis (App. A, *infra*, 3a; Stip. paras. 24-27). On audit, the Internal Revenue Service assessed additional FICA and FUTA taxes against respondent on the ground that the meals should be valued at $1.25 (Stip. paras. 28, 37). Respondent paid the additional assessments and thereafter filed

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[2] Respondent also furnished meals at half-price to showgirls and casino dealers and free meals to executives, department heads, pit bosses and accounting personnel in the hotel coffee shop (App. A, *infra*, 2a; Stip. para. 7). These noncafeteria meals are not at issue here.

claims for refund for all of the FICA and FUTA taxes paid with respect to the meals furnished to its employees. In its refund claims, respondent took the position that the means were not "wages" for purposes of FICA and FUTA (App. A, *infra*, 3a).

2. Upon the Commissioner's disallowance of its claims for refund, respondent brought this suit in the Court of Claims. It contended that the value of the meals did not constitute "remuneration for employment, including the cash value of all remuneration paid in any medium other than cash" within the meaning of 26 U.S.C. (1970 ed.) 3121(a) and ~~3401(a)~~ 3306(b) On motions by both parties for summary judgment, the Court of Claims held that the meals respondent furnished to its employees were not "remuneration" and therefore not "wages" for purposes of FICA and FUTA (App. A, *infra*).

The court relied upon the following factors: (1) that the record did not show that respondent's labor negotiations "ever weighed free meals with cash wages and other benefits" (App. A, *infra*, 9a); (2) that the meals were furnished for the convenience of the employer; (3) that the employees did not work during mealtime (*ibid.*); (4) that the meals were not of "such massive quantities * * * as to compel the inference that the cash wage could not but be set lower in light of these emoluments" (App. A, *infra*, 10a); and (5) that "[t]he value of the free meal did not have any fixed or established proportion to the value of the employee's services as stated in money" (*ibid.*).

In ruling that the meals in question were not "wages," the Court of Claims acknowledged that the "convenience of the employer" test of Section 119 of the 1954 Code was strictly applicable only to income tax cases.[3] However, in resolving whether the meals in question were "remuneration" for purposes of this case, the court felt obliged to consider "whether [respondent] furnishes free meals primarily to effectuate [its] own policies, or to sweeten the pot for employees" (App. A, *infra*, 11a).

3. Moreover, the court rejected the government's argument that Section 31.3121(a)-1 of the Treasury Regulations expressly required the inclusion of the meals in the FICA and FUTA "wages" tax base. That Regulation provides that "[o]rdinarily, facilities or privileges (such as entertainment, medical services, or so-called 'courtesy' discounts on purchases)" are not considered remuneration for employment if they are "of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees." The Regulation goes on to state that "[t]he term 'facilities or privileges', however, *does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees*, or to seamen or other employees aboard vessels, *since generally these items constitute an appreciable part of the total remuneration of such employees*" (emphasis supplied).

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[3] See *Commissioner* v. *Kowalski*, 434 U.S. 77 (1977).

The court concluded that the Regulation's use of the terms "generally" and "ordinarily" made it "a hunting license to authorize IRS agents to flush up additional revenue from employers" (App. A, *infra*, 14a) and rendered it too vague to serve as a guide to employers. The court observed, "[w]e think [that] in . y case when the only guide to Treasury policy was the unsatisfactory regulation above quoted, the employer should not be assessed for not withholding unless he could have told from the statute itself that his proposed free food or lodging for employees was 'remuneration,' and in this regard, the statute should be given a fairly strict though not hostile construction" (App. A, *infra*, 14a).

Finally, the Court of Claims acknowledged that the Sixth Circuit in *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (1967), had applied the Regulation which the government contended was controlling, and held that the value of meals provided to restaurant employees was "wages" includable in the FICA and FUTA tax base. However, it regarded that precedent as no longer viable in the light of this Court's decision in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978) (App. A, *infra*, 15a).

The concurring judge declined to join the "excess observations" of the court's opinion that "suggest[ed] that almost all free meals by hotels and restaurants, no matter what the circumstances, are excluded from 'wages' under FICA and FUTA, and * * * denigrate[d] a longstanding regulation which includes such meals in 'wages' once they are found to be com-

pensation or remuneration" (App. A, *infra*, 20a). In his view, the meals were not compensation or remuneration because they were of relatively low value and were offered as a means of promoting good will or efficiency (App. A, *infra*, 21a). The concurring judge therefore concluded that "the meals here fall within the exception permitted by the regulation's meal exception itself" (*ibid.*).

REASONS FOR GRANTING THE PETITION

1. The decision below holding that the meals respondent furnished to its employees on a daily basis pursuant to the requirements of its labor contracts were not "wages" for purposes of the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) conflicts with *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (6th Cir. 1967), and *Pacific American Fisheries* v. *United States*, 138 F.2d 464 (9th Cir. 1943). Accord: *S.S. Kresge Co.* v. *United States*, 218 F. Supp. 240 (E.D. Mich. 1963). In those cases, the Sixth and Ninth Circuits ruled in comparable situations involving restaurant and factory workers that the value of free meals furnished by employers was a part of the employees' "wages" for purposes of FICA and FUTA. This Court should resolve the conflict and establish a national rule with respect to this common form of compensation for hotel and restaurant workers and for other employees stationed in remote areas.

The question presented is of substantial importance to the administration of the FICA and FUTA tax

provisions and the benefit statutes and regulations under the Social Security Act. The record in this case shows that like respondent, most major Las Vegas resort hotels provided meals to their employees on a daily basis. In 1972, hotels with 25 or more guest rooms in the Las Vegas area had 21,758 employees and an aggregate annual payroll of more than $186 million.[4] It is expected that many hotels, restaurants and other businesses that have a similar free-meals policy will file claims for refund and institute suits in the Court of Claims invoking the authority of the decision in this case.[5]

Moreover, we are advised by the Internal Revenue Service that there are currently 630 cases pending at the audit and appellate administrative levels involving the meals-as-wages issue, with $11,544,720 in FICA and $739,077 in FUTA taxes at stake. There are also 17 cases pending in litigation regarding this issue, involving approximately $1,092,000 in FICA and FUTA taxes. The question whether similar fringe benefits constitute FICA and FUTA "wages"

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[4] See *1972 Census of Selected Service Industries*, Vol. II, Area Statistics, page 29-6.

The Bureau of Labor Statistics of the Department of Labor advises that as of 1972, there were 359,524 "eating and drinking" establishments in the United States, with 3,857,000 "eating and drinking" workers. As of 1970, approximately 85% of the employees in hotels, and 78% in restaurants, received at least one free meal per day.

[5] The national tax director of a major accounting firm recently stated that the decision below " 'will spawn more refund claims than any [decision] I've seen in 15 or 20 years' * * *." *Wall Street Journal*, May 1, 1979, at 1.

is present in 1,331 cases at the audit and appellate levels, involving $24,097,130 in FICA taxes and $704,222 in FUTA taxes. Finally, there are nine cases in litigation involving FICA and FUTA taxes on such fringe benefits, involving approximately $236,000.[6]

2.a. Sections 3121(a) and 3306(b) of the Internal Revenue Code of 1954, Appendix D, *infra*, 26a, 28a, broadly define "wages" for purposes of FICA and FUTA tax provisions as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash * * *."[7] These employment taxes were enacted in 1935 as part of the Social Security Act, ch. 531, 49 Stat. 620, in order to provide old age, disability, and unemployment benefits to workers.[8] To accomplish this pur-

[6] Two such cases are currently pending in the courts of appeals: *Rowan Companies* v. *United States*, No. 77-3044 (5th Cir.) (whether free meals and lodging furnished on offshore oil platforms constitute FICA and FUTA wages); *Oscar Mayer & Co.* v. *United States*, No. 79-1743 (7th Cir.) (whether below-cost personal use of company cars constitutes FICA and FUTA wages).

[7] The definition of "wages" in the original portions of the Social Security Act (now FICA and FUTA) is the same as in the benefit provisions. As a result, the Regulations defining "wages" for purposes of the benefit provisions are virtually identical to those under the FICA and FUTA statutes. See 20 C.F.R. 404.1026(a)(6), App. E, *infra*, 32a.

[8] The old age and disability tax provisions of Title VIII of the Social Security Act, and the unemployment compensation tax provisions of Title IX of the Act, were recodified as Chapter 9 of the Internal Revenue Code of 1939. H.R. Rep. No. 6, 76th Cong., 1st Sess. 4 (1939). These Social Security taxes were then incorporated into Subtitle C of the Internal Revenue Code of 1954, as the Federal Insurance Contributions Act and the Federal Unemployment Tax Act.

pose, Sections 3101 and 3121(a) of the Internal Revenue Code (App. D, *infra*, 26a) imposed a tax on both employers and employees with respect to the first $7,800 of each employee's "wages."[9] Under Title II of the Social Security Act, as amended (42 U.S.C. 401, *et seq.*), the Internal Revenue Service regularly reports to the Social Security Administration the amount of each employee's "wages" on which taxes have been paid. That amount serves as the basis for computing each employee's old age and disability benefits. See *United States* v. *Silk*, 331 U.S. 704, 711 (1947). Unemployment taxes are imposed solely on employers with respect to the first $4,200[10] of "wages" paid to their employees (Section 3306(b)).

Since 1940, the Employment Tax Regulations have defined "wages" to mean "all remuneration for employment," even if such remuneration is furnished for the "convenience of the employer" and is thereby excluded from "wages" for federal income tax withholding purposes under Sections 119 and 3401 of

[9] The FICA tax was originally imposed on the first $3,000 of each employee's annual wages. Social Security Act, Section 811 (49 Stat. 639). As of 1979, the tax is imposed on the first $22,900 of annual wages. Pub. L. No. 95-216, Section 103(b)(2), 91 Stat. 1513.

[10] Originally, the tax was imposed on the entire year's wages. Social Security Act, Sections 901, 907 (49 Stat. 639, 642). As of 1979, the tax is imposed on the first $6,000 of annual wages. Pub. L. No. 94-566, Section 211(a), 90 Stat. 2676.

the Internal Revenue Code.[11] The fact that items of compensation may be includable in the "wages" base for FICA and FUTA tax purposes even though excludable from gross income for income tax purposes is consistent with the broad social welfare goals of the Social Security program. See *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946); *United States* v. *Silk*, *supra*; *S.S. Kresge Co.* v. *United States*, *supra*, 218 F. Supp. at 243; H.R. Rep. No. 615, 74th Cong., 1st Sess. 21 (1935). The Regulations specify that, for Social Security tax purposes, the value of meals furnished by an employer ordinarily constitutes taxable "wages." For purposes of this case, the pertinent portion of the Regulation provides as follows (Section 31.3121(a)-1(f) (emphasis supplied)):[12]

> Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. *The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.*

[11] See Rev. Rul. 57-471, 1957-2 Cum. Bull. 630, explaining Treasury Regulations 106, Section 402.227 (1940 ed.) (FICA) and Treasury Regulations 107, Section 403.227 (1940 ed.) (FUTA). See also Mim. 5657, 1944 Cum. Bull. 550; *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (6th Cir. 1967). Compare *Commissioner* v. *Kowalski*, 434 U.S. 77 (1977).

[12] Section 31.3306(b)-1 of the Employment Tax Regulations, which defines "wages" for FUTA purposes, is virtually identical.

Given the breadth of the statutory definition of "wages" and the specific regulatory requirement to include "the value of meals * * * furnished * * * to restaurant or hotel employees * * *," it is plain that the decision below excluding such employee compensation from the FICA and FUTA tax base represents a virtual invalidation of the Regulations. These Regulations were promulgated pursuant to specific congressional delegations of authority.[13] While the Court of Claims did not explicitly strike down the Regulation which the government urged to be controlling,

[13] The legislative delegations with respect to the tax provisions were contained in Sections 808, 908 and 1102 of the Social Security Act (49 Stat. 638, 643, 647). Section 1102 is now codified as 42 U.S.C. 1302. Sections 808 and 908 were reenacted respectively as Sections 1535 and 1609 of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)). In the Internal Revenue Code of 1954, Sections 808 and 908 were not retained in separate sections. Instead, they were incorporated into Section 7805 of the 1954 Code, without any change in meaning or scope. See H.R. Rep. No. 1337, 83d Cong., 2d Sess. A324-A325 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 484 (1954). See *Goldsboro Christian Schools, Inc.* v. *United States*, 43 A.F.T.R.2d ¶ 79-473, at 872 & n.12 (E.D.N.C. 1978).

The legislative delegations respecting the benefit statutes were contained in Sections 205 and 1102 of the Act (49 Stat. 624, 647), which are now codified as 42 U.S.C. 405(a) and 1302.

it concluded that the Regulation's use of the terms "generally" and "ordinarily" to characterize the circumstances under which the value of meals to such employees would constitute "wages" made it too vague to serve as a guide to employers.

But the Treasury's casting of the meals-as-wages rule as a "general" or "ordinary" proposition is simply designed to exclude the particular situation where meals are provided on a non-recurring infrequent basis so that they do not represent a significant aspect of the employee's compensation. That is assuredly not this case. Here, respondent provided daily meals of a prescribed character in accordance with its obligations under a labor contract and those meals constituted 8.3% of the employees' gross wages (App. A, *infra*, 4a-5a). Under these circumstances, we submit, the meals plainly constitute "remuneration" within the meaning of the statute. There is no basis in either the statute or Regulations for the Court of Claims' restrictive gloss that meals are includable in "wages" only if they are of "such massive quantities of free food * * * as to compel the inference that the cash wage could not but be set lower in light of these emoluments" (App. A, *infra*, 10a).[14]

[14] The majority opinion also relied upon the facts that the record did not show that the meals were an element of the collective bargaining process but simply described company policy, that they were furnished for the convenience of the employer, that the employees did not work during mealtime, and that the value of the meal was not related to the employee's rank (App. A, *infra*, 9a-10a). These factors, however, have no relation to the question whether the meals were "remuneration." The facts that the meals may have served respondent's convenience and that the employees did not work during mealtime are not inconsistent with the conclusion that they were "wages." Indeed, the court acknowledged that the convenience of the employer test is applicable only to ordinary income tax cases covered by Section 119 (App. A, *infra*, 11a). Moreover, if the performance of services during mealtime were relevant, vacation pay might well be excluded from "wages." And a uniform cash bonus paid to employees of all ranks obviously would be an increment of the "wages" of each of them.

The grounds upon which the concurring judge rested his opinion are likewise erroneous. In his view, the meals were excludable because they were of relatively low value, and constituted a relatively low percentage of the employees' total remuneration (App. A, *infra*, 21a). But to an individual earning less than $7,800 per year in cash wages (before taxes), the value of a daily meal furnished by the employer is not insubstantial. And respondent's furnishing of 1,193 meals per day can hardly be characterized as an item of relatively low value or a negligible percentage of total payroll costs.

b. The Court of Claims likewise erred in condemning the Regulation as a "nearly worthless" "guide to employers" (App. A, *infra*, 14a). Wholly apart from the court's unwarranted rejection of the Regulation's use of the terms "generally" and "ordinarily" (see *supra*, pages 13-14), it disregarded a series of published rulings that have consistently construed the FICA and FUTA Regulations as requiring the inclusion of the value of one free meal per workday as an appreciable part of the remuneration of the employee. See Rev. Rul. 57-471, 1957-2 Cum. Bull. 630, as modified by Rev. Rul. 62-150, 1962-2 Cum. Bull. 213; Rev. Rul. 71-411, 1971-2 Cum. Bull. 103,

105. These rulings interpreting the Regulations are entitled to great weight. As this Court observed last Term in *National Muffler Dealers Association* v. *United States*, No. 77-1172 (Mar. 20, 1979), slip op. 12, n.19, "the plausibility and consistency of the Commissioner's interpretation are relevant to the reasonableness of the regulation as applied here, [but] the Commissioner is otherwise free to determine how the regulation he has written should be construed." There is accordingly no basis for the Court of Claims' characterization of the Regulation as a "worthless guide" for employers. Indeed, the fact that respondents originally included 45 cents per meal in the "wages" tax base convincingly shows that employers were well aware of the Treasury's position with respect to the includability of daily meals as wages.

c. *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), upon which the Court of Claims relied in denying the existence of a conflict (App. A, *infra*, 14a-15a), does not bear upon the question presented in this case. There, the Court held that an employer's reimbursement for 1963 lunch expenses of employees on nonovernight company travel did not constitute "wages" subject to withholding by their employer within the meaning of Section 3401(a) of the Code.

That decision turned on the fact that the pertinent Treasury Regulations excluded from the concept of wages amounts paid for traveling or other business expenses without regard to whether the travel was away from home overnight. In these circumstances,

the Court was reluctant to impose secondary tax liability on the employer by retroactively applying the overnight rule of *United States* v. *Correll*, 389 U.S. 299 (1967), to the year 1963 when "not one regulation or ruling required withholding on any travel expense reimbursement" (435 U.S. at 32). Here, on the other hand, the Treasury Regulations and published rulings extant during the year at issue unambiguously require the inclusion of meals in the FICA and FUTA "wages" tax base. The Court of Claims therefore erred in concluding that *Central Illinois Public Service Co.* undermines the authoritative force of *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (6th Cir. 1967) and *Pacific American Fisheries* v. *United States*, *supra*.

3. The dependence of the Social Security system upon FICA and FUTA tax revenues makes review by this Court of the decision below especially important. As matters now stand, respondent's employees can sue in the United States District Court for the District of Nevada to have their wage records corrected to reflect the value of the meals at issue. See *Social Security Board* v. *Nierotko*, *supra*; Social Security Act, 42 U.S.C. (1970 ed.) 405(g). The district court would presumably rule in their favor on the authority of the Ninth Circuit's decision in *Pacific American Fisheries*. However, if the decision below remains unreviewed, respondent and every other employer providing such meals can institute refund suits in the Court of Claims and recover the taxes upon which benefits will have to be paid. This Court should re-

solve the conflict and clarify the application of these important federal statutes to all workers who are provided meals or similar benefits by their employers. See *United States* v. *Webb, Inc.*, 397 U.S. 179, 182 (1970).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1979

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 374-75

(Decided April 18, 1979)

HOTEL CONQUISTADOR, INC., for itself and as successor by merger to Tropicana Casino, Inc. v. THE UNITED STATES

Before DAVIS, NICHOLS and KASHIWA, *Judges*.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

NICHOLS, *Judge*, delivered the opinion of the court:

This tax case is before the court on cross-motions for summary judgment on stipulated facts. The plaintiff is suing for itself and as successor by merger to Tropicana Casino, Inc., the latter having operated a casino on the former's hotel premises at Las Vegas, Nevada. The issues concern calendar year 1971 taxes of the sort commonly designated as FICA (Federal Insurance Contributions Act) and FUTA (Federal Unemployment Tax Act), assessed with respect to employees' wages. Both taxpayers had large

staffs: culinary workers, bartenders, waiters, carpenters, plumbers, electricians, gardeners, parking lot attendants, etc., whose wages (excluding the alleged wages in dispute) did not exceed $7,800 per year. Most of these were required to wear uniforms which the employer furnished free of charge. All were allowed at least one meal per day, some two, without charge, at an employees' cafeteria. Plaintiff says the value of each meal was 45 cents, defendant $1.25. Some employees, of those involved, were union members whose collective bargaining agreements called for these meals and specified a minimum quality: "palatable, wholesome, and comparable in quality to those served to customers." Other unions did not have any agreement concerning meals, and some employee categories were non-union, but management treated all alike in this respect. The eating place for all was a windowless basement cafeteria, off limits for guests.

Some more privileged employees, *e.g.*, showgirls, could eat at half price or free in a coffee shop frequented by guests, but they are not involved in this suit. The management was willing to provide all this free food primarily to minimize the amount of time employees would need for meals during working hours, but also realized it would help to attract and hold employees. Meal periods ranged in time from 30 to 45 minutes. Because of the unavailability of adequate, nearby meal facilities, one hour to one hour fifteen minutes would have been required for meals not served on the premises. The uniformed employ-

ees, the majority, were not allowed to use the public restaurants on the premises in uniform or to wear uniforms at all off the premises. Thus the management would have had to provide additional time for changing clothes.

Management used 45 cents as an addition to or part of "wages" in computing the FICA and FUTA taxes. Defendant on audit insisted that the proper figure was $1.25. Where it got that figure the stipulation does not show, but by the collective bargaining agreements already mentioned, management could at its option pay $1.25 in lieu of each free meal. The stipulation does not reflect that this option was ever exercised. Plaintiff in its "protest" said the $1.25 was a penalty, but this is not stipulated.

Plaintiff now contends that the involved meals were not "wages" or not "remuneration" in any part. Thus the taxes were, according to it, overpaid from the beginning, even so far as based on the 45 cents meal value. Whether it made a proper claim for refund as to that is an issue in the case. There is no question that it paid on demand the additional taxes due on the $1.25 rate and that it has properly claimed refund as to them, having paid the employees' portion, without withholding, as well as its own. It is conceded that ordinary income taxes are not applicable: by virtue of I.R.C. § 119, the "convenience of the employer" test is incorporated in statute law and is decisive there. Plaintiff collected from employees by withholding the portion of the FICA taxes applicable to them, on the 45 cents value, but it dis-

claims any intent to sue here as their surrogate. Thus there are at issue here, on the 45 cents value, only the employer's portion of the FICA tax paid, and on the 46 cents—$1.25 value, both portions. There is no employees' portion of the FUTA tax, so that complication does not arise.

Our determinations make it unnecessary to decide whether the 45 cents or the $1.25 values are correct, and there is no triable issue of fact as to any value under 45 cents or over $1.25. They set for our purposes the minimum and maximum value of the meals, so far as value may be pertinent. Defendant made some faint effort to suggest the meals might be worth over $1.25, because of the contract requirement, with some unions, that meals be "comparable in quality to those served to customers." But there is nothing to show what was served customers. Meals taken by many people in the middle of their working day are but snacks, and no doubt customers, even wealthy ones, also wanted snacks very often. Plaintiff may have operated Lucullan gourmet restaurants, but there was also a coffee shop. We need not assume an issue as to any higher value in the absence of any effort to prove the IRS was in error in setting the value at $1.25. There is thus nothing to show that some unions exacted, for their members, any more than a $1.25 meal would normally imply. We are not required, as judges, to forget all our knowledge of how things are, and we know that nobody, in 1971, could have bought a Lucullan gourmet meal for $1.25, even in Las Vegas, Nevada. At that value, the

meals "represented an average of 8.3 percent of employee's gross wages," per the stipulation.

We hold that the involved meals were not "remuneration" and, therefore, not "wages." Both are terms of art which require, beyond mere semantics, a careful analysis of the context in which Congress uses them and the meanings they have been given, both in regulations and in decided cases.

For FICA and FUTA purposes, as well as for income tax withholding, "wages" are "all remuneration for employment * * * including the cash value of all remuneration paid in any medium other than cash; * * *." I.R.C. §§ 3121(a), 3306(b), 3401(a). The provision of I.R.C. § 119 excluding from gross income the value of meals and lodging furnished an employee, on the business premises of the employer and for his convenience, does not apply by its terms to FICA and FUTA taxes.

The Supreme Court has held in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), that because of the differences in statutory language used, there does not have to be congruence between the scope of the ordinary income tax, on the one hand, and FICA and FUTA taxes, on the other. Though defendant here derives encouragement from this, it was written there as to a situation where the income tax liability was assumed and defendant wanted the FICA and FUTA taxes, there at issue, to conform. The Court pointed out that "wages," the sole basis of FICA and FUTA taxation, is a less inclusive term than "income," which includes

"wages" and much besides. The issue was the taxability of expense reimbursement for meals consumed by employees in travel status but not away from home overnight. Defendant said, if such reimbursement was "income" it must be "wages" and the Court perceived this as an obvious non sequitur. It is another matter altogether to say that "wages," though normally a narrow term compared to "income," may include some items that "income" does not include. This proposition cannot be said to derive any support from the Supreme Court's decision. We cannot rest our decision on the converse proposition, however, tempting though it may be to do so, because of the special impact of § 119 on the definition of "gross income," but not of "wages." Defendant's effort to define "wages" as broader than "income," though it may generate some badly needed revenue, certainly cannot be commended as facilitating the simplicity and uniformity that are so badly needed when thousands of employers are required to act as deputy tax gatherers from millions of employees.

Defendant cited in its original brief, quoted from and relied heavily on, the decision in *Central Illinois Public Service Co.* v. *United States*, 540 F.2d 300 (7th Cir. 1976), the decision reversed after the brief was written by the Supreme Court's decision above discussed. The Seventh Circuit called "unpersuasive" and elected to go into conflict with *Royster* v. *United States*, 479 F.2d 387 (4th Cir. 1973). That case holds that reimbursement to salesmen for meals eaten while on the road was not "wages" because not

"remuneration," noting that the reimbursement served the employer's purpose of deterring the salesmen from returning home to eat and thus enhancing their reimbursable mileage. It distinguished a case where employees were required to be on call while eating and thus remained at the employer's disposition. In *Royster*, the employees rendered no service while eating, and thus the reimbursement could not be remuneration for service rendered. Without overstressing the point, we note it was not the *Royster* decision that the Supreme Court reversed.

Our decisions in other fact situations stress the divergence between "income" and "wages" and the lesser coverage of the latter word. *Peoples Life Ins. Co.* v. *United States*, 179 Ct. Cl. 318, 373 F.2d 924 (1967) (employer paid employees' expenses for attending conventions of such employees); *Humble Oil & Refining Co.* v. *United States*, 194 Ct. Cl. 920, 442 F.2d 1362 (1971) (reimbursement for moving expenses to employer's new headquarters); *Humble Pipe Line Co.* v. *United States*, 194 Ct. Cl. 944, 442 F.2d 1353 (1971) (same); *Allstate Insurance Co.* v. *United States*, 209 Ct. Cl. 1, 530 F.2d 378 (1976) (reimbursement for indirect moving expenses; cites with approval and follows *Royster*, *supra*.)

Besides reversing the result in *Central Illinois*, *supra*, the Supreme Court also took the trouble to disapprove certain language of the court below, saying—

> An expansive and sweeping definition of wages, such as was indulged in by the Court

> of Appeals, 540 F.2d, at 302, and is urged by the Government here, is not consistent with the existing withholding system. As noted above, Congress chose simplicity, ease of administration, and confinement to wages as the standard * * *. [435 U.S. at 31.]

The disapproved definition is, among several statements at 540 F.2d 302, apparently the following:

> Remuneration for services cannot be viewed this narrowly. [*I.e.*, as in *Royster*.] The employment relationship is a two-sided bargain, with the employee's services being given for a total package of remuneration, including salary, pension, paid vacation time and other remuneration such as reimbursed lunches. * * *

It may be noted, as will be more fully developed later, even the Treasury does not contend that every expense incurred by the employer that tends to make the job more acceptable to the employee, constitutes "remuneration" and "wages."

We think the following analysis is supported by the authorities cited and in turn supports the result we reach, that the involved meals were not "wages."

1. With respect to the non-union employees, and the union ones whose unions did not bargain for free meals, the concept of an exchange of services for a "total package of remuneration" must be rejected as fictitious. With respect to the union members whose unions obtained commitments for free meals, the stipulation does not state whether such commitments preceded or followed adoption of a company policy for

free meals. There is nothing to show that negotiations ever weighed free meals with cash wages and other benefits, as a total package, or that proposals by either side respecting such meals weighed their value against other elements of the total compensation. While the management realized the free meals would help to attract and hold employees, the stipulation makes it clear that the principal reason for the free meals was the aid they gave in implementing company policy.

2. Defendant conceded that the meals were furnished for the convenience of the employer. The principal reason was to keep uniformed employees out of the public restaurants of the hotel except in line of duty, and from leaving the hotel in uniform to purchase meals elsewhere; on the other hand, to avoid expense of time (we suppose on pay status) changing in and out of uniform in the middle of the work day. Also, the free meals facilitated keeping lunch periods down to 30 or 45 minutes. The free meals thus tend to make feasible company policies that otherwise would be irksome and difficult to enforce.

3. There is nothing to show that any work is done or service rendered by the employee while he is consuming the free meal. He is not lured into the cafeteria for the purpose of extracting any benefit for the employer while he is there, except the negative benefit already stated, of his not being in some other place. No employee is required to eat in the cafeteria, and there is nothing to suggest that "brown-bagging" would not be an acceptable alternative.

4. Certain kinds of employment may have as their incidents such massive quantities of free food or lodging or both as to compel the inference that the cash wage could not but be set lower in light of these emoluments, *i.e.*, that the wage is paid in part in non-cash benefits. This case is not in that category. In that regard, it may be noted incidentally that the meal allowance in *Central Illinois, supra*, $1.40, is referred to as modest even for 1963, not "a money making proposition for an employee." (435 U.S. at 23 n. 3 citing the District Court, 405 F.Supp. 748, 749.) A $1.25 figure for 1971 must be considered more modest than modest. Any "total package" view of the $1.25 would also have to take into account the irksome restrictions that go with it. If the $1.25 value is regarded as compensation for being in the cafeteria for 30 or 45 minutes (and not elsewhere) inquiry would be necessary whether the applicable minimum wage was respected.

5. The value of the free meal did not have any fixed or established proportion to the value of the employee's services as stated in money. The lowest paid employee might eat the most, just as he might need the most health benefits.

Plaintiff argues that the "convenience of the employer" test much antedates its first introduction into statute law as § 119 of the 1954 Code, although it admits that efforts by defendant to exclude the test from FICA and FUTA cases, while applying it to income taxes, also antedates 1954. It urges that "wages" must mean the same thing for withholding

for income taxes (I.R.C. § 3401) as it does in connection with FICA and FUTA taxes, because the same language is used. If plaintiff is right, since the payments pass the "convenience of the employer" test, all other tests are avoided. Defendant argues that the holding in *Commissioner* v. *Kowalski*, 434 U.S. 77 (1977) in effect is that § 119 preempts prior law on the "convenience of the employer" test making it applicable only where § 119 expressly says it is applicable, *i.e.*, in ordinary income tax cases. We are going to assume for purposes of this opinion that defendant is right, although anything said in *Kowalski* must be regarded as dictum so far as concerns FICA and FUTA taxes, which were not before the Court. See comment on *Kowalski* in *Central Illinois, supra*, 435 U.S. at 24-25. Where defendant is in error, clearly, is that dethroning "convenience of the employer" as the sole test does not mean the court is required to ignore, in defining "remuneration," whether the employer furnishes free meals primarily to effectuate his own policies, or to sweeten the pot for employees.

Defendant also relies on statements in Treasury Regulations on Employment Tax (1954 Code) Section 31.3121(a)-1 (on FICA, but § 31.3306(b)-1 on FUTA is similar):

> (c) The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions on sales

or on insurance premiums, are wages if paid as compensation for employment.

* * * * *

(e) * * * the medium in which the remuneration is paid is also immaterial. *It may be paid in cash or in something other than cash, as for example, goods, lodging, food, or clothing.* Remuneration paid in items other than cash shall be computed on the basis of the fair value of such items at the time of payment. * * *

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. *The term "facilities or privileges," however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.*

The emphasis on certain lines is that of defendant in its brief.

Careful reading of these passages will show that the regulation admits that "remuneration" is the test of what "wages" include, and that "remuneration" does not include all non-cash benefits the employer confers. As regards food and lodging furnished without charge, they are not "wages" unless they are "remuneration," and the regulation admits that not all food and lodging benefits are "remuneration." Only "ordinarily" and "generally" they are, because "generally" they constitute an appreciable part of the "total remuneration." Thus they are "remuneration" because they are part of "remuneration." The employer who concludes subjectively that his free meals are not "remuneration," will not find anything in the regulation to tell him whether he is right or wrong on the particular facts of his case, except perhaps, a slant by the Treasury in favor of their being remuneration is signalled or intimated by use of the words "ordinarily" and "generally." The employer has no way of telling whether or not his plan is the ordinary or general case, except language that seems to intimate the regulator is thinking of rather massive benefits as general, which the seaman example illustrates. He would know that a seaman gets all his meals free, not just lunch, and gets besides, as "lodging," at least a bunk to sleep on off watch, perhaps a stateroom. The concluding part of the quoted regulation would tell him to compare the food or lodging benefits with the "total remuneration," but he is not told what ratio will trigger a classification one way or the other; *i.e.*, what part the regulator deems an "appreciable" part. There is, indeed, nothing to show the regulator considers the construction of such a ratio the sole test of what is or is not "remuneration."

Viewed as a hunting license to authorize IRS agents to flush up additional revenue from employers, the regulation is brilliantly conceived. As a guide to employers in their relations with employees, it is nearly worthless. Congress intended by the use of the word "wages" to set a standard that was "intentionally narrow and precise." *Central Illinois, supra*, 435 U.S. at 31. "Because the employer is in a secondary position as to liability for any tax of the employee, it is a matter of obvious concern that, absent further specific congressional action, the employer's obligation to withhold be precise and not speculative." *Ibid.* The Court then refers to a passage in our *Humble Oil & Refining Co.* case *supra*, 194 Ct. Cl. at 933, 442 F.2d at 1369-70, which rejects the imposition of retroactive liability on an employer for not withholding when the duty to withhold was not clearly spelled out when the alleged wages were paid. The concurring opinions in *Central Illinois* further stress this theme of retroactivity.

We think in any case when the only guide to Treasury policy was the unsatisfactory regulation above quoted, the employer should not be assessed for not withholding unless he could have told from the statute itself that his proposed free food or lodging for employees was "remuneration," and in this regard, the statute should be given a fairly strict though not hostile construction. Should there be a timely Treasury regulation stating clearly what, in the Treasury view, is "remuneration," in this con-

text, a different situation would be presented, as to which we express no opinion.

Defendant points out that the above regulation was quoted and applied to make FICA and FUTA taxes apply to free meals for restaurant employees in *S. S. Kresge Co.* v. *United States*, 379 F.2d 309, 310 (6th Cir. 1967). That circuit, however, did not have, as we do, the benefit of the criteria to apply to regulations in this area, as prescribed in *Central Illinois, supra*, and the circuit says the regulation creates a "presumption" of taxibility in such cases, which perhaps it does, but perhaps the presumption was impossible to rebut because the court had not been taught to exclude from its analysis the broad and sweeping definition of "wages," rejected in *Central Illinois.*

Thus we conclude that in calendar 1971 plaintiff was not obliged to withhold and pay FICA and FUTA taxes based on the theory the free meals it furnished employees were "wages."

There still remains the issue of the timeliness of plaintiff's claim for refund. That issue applies only to the taxes on the meals as "wages" at the 45 cents valuation, which plaintiff timely paid. It is conceded that plaintiff did file timely requests as to the additional amounts it paid to make up the tax on meals at $1.25. In 1973, after a dispute had arisen on audit, plaintiff filed a "protest" defending the 45 cents valuation but also asserting that FICA and FUTA taxes did not apply to the meals at all. Unless this "pro-

test" is taken as a request for refund of the original tax, no timely such request was ever filed, since the 1975 formal claims were more than three years after the returns and more than two years after payment. IRC § 6511(a).

The 1973 "protest" cannot be taken as an informal claim for refund of the FICA taxes for the reason that, if it requested any refund of the original payments, it did so only for the employer's share. Plaintiff never purported, and does not purport now, to be seeking any adjustment on account of the employees' share, which had been withheld from them, and this despite the fact that by its own theory maintained in the protest, the withholding by it was necessarily unauthorized and unlawful. Plaintiff cannot prosecute a claim for refund in that fashion. In *Atlantic Department Stores* v. *United States*, 557 F.2d 957 (2d Cir. 1977), it is held that the claim for refund must show that the employee has, if feasible, been reimbursed for the tax overpayment collected from him. This is imputed to certain statutory and regulatory provisions therein set forth, which need not be repeated here. It seems a clearly equitable requirement since the employer should not be allowed to correct its own error as affecting its own pocket, but not as affecting the employee's. Plaintiff says *Atlantic Department Stores* deals with an error, admitted to be such by the government, and it is inequitable to require it to pay the refund to the employees when the government admits no error in the payment and indeed is demanding more. There is much to be said

for this argument, but we think it should have been made in the first instance in or with the claim for refund. Possibly defendant might in the circumstances have accepted statements showing that plaintiff had been in contact with the employees (at least those still on its payroll) and was doing whatever was feasible to protect their interests, short of actually distributing to them a still hypothetical refund. At any rate, we think the protest lacked an indispensible element that a formal claim would or should have had, alerting defendant's officials to the problem and showing what plaintiff had done or would do to solve it. Six years have now passed from the protest date, and whatever difficulties there ever were in protecting the employees will now be much increased. We think this defect in the protest excuses defendant's not regarding it as a claim for refund of the FICA taxes, especially in light of the absence of any express statement that a refund was demanded. Defendant was late in raising this issue, doing so only in its reply brief, but plaintiff has been given a chance to respond. Having heard from both, we have no hesitation in saying defendant is right.

The FUTA taxes fall wholly on the employer, and, therefore, the question of overdeducting from employees would not arise. There was no reason to see refunding the taxes paid on the 45 cents value as involving any other or different problem than the tax asserted on the added value up to $1.25. In these circumstances, we think the Commissioner should

have viewed the protest as advising him that the taxpayer contended it had overpaid FUTA taxes, and the requirements for an informal claim for refund are met. *United States* v. *Kales*, 314 U.S. 186 (1941); *Newton* v. *United States*, 143 Ct. Cl. 293, 163 F.Supp. 614 (1958).

A curious feature of this case is that in midst of briefing of the summary judgment motion, defendant filed checks totaling $41,609.12 with our clerk, together with a motion to dismiss. The motion asserted that defendant had tendered refund of the full amount due, with interest; therefore, there was no money claim before the court; therefore, by the doctrine of *United States* v. *Testan*, 424 U.S. 392 (1976), we lacked jurisdiction. By order dated October 2, 1978, we held that we had jurisdiction, citing *Church of Scientology of Hawaii* v. *United States*, 485 F.2d 313 (9th Cir. 1973), that *Testan* did not apply, but that plaintiff's expectation of a res judicata or collateral estoppel effect from the anticipated decision was not a sufficient reason for trying a case when no money was at stake. We ordered suspension. By order of October 26, 1978, however, we lifted the suspension, plaintiff having pointed out that by I.R.C. § 7405, if plaintiff took the check, defendant could sue in a U.S. District Court for recovery of a refund erroneously paid. Defendant later denied it had any such strategy in mind, and we are sure it did not. However, we believe a party who has sued the United States in this court in a tax case is entitled to a trial or, as here, a decision on dispositive

motion, in this forum, unless the United States is willing to have judgment entered against it. Such disposition as was proposed here was offered as a compromise settlement which plaintiff had a right to refuse. As with any other settlement negotiations, we have disregarded it in our adjudication of the case. Defendant's vigorous and able prosecution of its cross-motion would belie any inference that it tendered the check because it believed it had no case, so we remain in the dark what its strategy was. Defendant withdrew the check after oral argument, and thus the offer is at an end.

Accordingly, defendant's cross-motion for summary judgment is granted with respect to the FICA tax payments for 1971 based on the 45 cents value of the meals, and the petition with respect to that issue is dismissed. The said motion is denied with respect to all other issues. The plaintiff's motion for summary judgment is granted with respect to all the 1971 FUTA taxes in dispute and with respect to the 1971 FICA taxes as assessed on the meal values over 45 cents, as explained in the opinion. In other respects the plaintiff's motion for summary judgment is denied. Interest is to be paid according to law and penalties are to be refunded conformable to our decision. Judgment for plaintiff is entered to the extent our conclusions require. The cause is remanded to the trial division for proceedings under Rule 131(c) to determine the amount of recovery.

DAVIS, *Judge*, concurring in the result:

Although there is a non-frivolous argument that, despite the stipulation of the facts, we should remand for a trial on the main issue of whether the meals constituted compensation or remuneration, I agree with the court that, since the parties have presented the matter on that stipulation and do not particularize any further facts to be developed, we can and should decide the question on the record now before us. However, I cannot join the court's opinion on the issue [1] because, in my view, it ranges far too widely and gratuitously covers ground wholly unnecessary to the decision of this particular case. The court's "excess" observations suggest that almost all free meals by hotels and restaurants, no matter what the circumstances, are excluded from "wages" under FICA and FUTA, and the opinion denigrates a long-standing regulation which includes such meals in "wages" once they are found to be compensation or remuneration. I think that, in all the circumstances,[2] it is a mistake to go so far beyond the specific facts of this case, and therefore separate myself from the large segments of the court's opinion which, in my view, constitute dicta.

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[1] I do join the segment of the court's opinion dealing with the adequacy of the refund claim.

[2] Including the parties' complicated efforts, on the one hand, to terminate this case without a court ruling, and, on the other, to turn it into a major ruling and precedent in this field of the law.

My sole ground for concurring in the result is that, on the particular facts now before us, the meals were *not* compensation or remuneration to the employees (and accordingly, by its own terms, outside the coverage of Treasury Regulation §§ 31.3121(a)-1 and 31.3306(b)-1). The facts which lead me to that conclusion are set forth in the "non-excess" portion of the court's opinion and I need mention only the following: the small value of the meals even in 1971; the absence of any indication that the employees were getting more than that relatively low value; the employers' own purposes in furnishing the meal; the relatively low percentage of the employees' total remuneration which is involved. The regulation excludes from remuneration "facilities or privileges" "if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees." The meals involved here fit well within that category.[3] True, the regulation goes on to except "*ordinarily*" meals or lodging furnished to restaurant or hotel employees, "since *generally* these items constitute an *appreciable* part of the total remuneration of such employees" (emphasis added). As I see it, the meals here fall within the exception permitted by the regulation's meal exception itself. No more need or should be decided or said.

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[3] The IRS never made any effort to include the value of uniforms furnished to employees even though a union agreement seemed to value the daily worth of a uniform at $1.00 (the agreement provided for plaintiffs to pay that amount for each day they failed to furnish a uniform).

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 374-75

[Filed May 25, 1979—Court of Claims]

HOTEL CONQUISTADOR, INC., for itself and
as successor by merger to
Tropicana Casino, Inc.

v.

THE UNITED STATES

K. Martin Worthy, attorney of record for plaintiff. *Michael C. Durney* and *Hamel, Park, McCabe & Saunders*, of counsel.

Donald H. Olson, with whom was *Assistant Attorney General M. Carr Ferguson*, for defendant. *Theodore D. Peyser*, of counsel.

Before DAVIS, *Judge*, presiding, NICHOLS and KASHIWA, *Judges*.

ORDER

This case comes before the court on defendant's motions, both filed May 2, 1979, for rehearing *en banc* pursuant to Rule 7(d) and rehearing pursuant to Rule 151(b). The seven active judges of the court, having carefully considered the suggestion for rehearing *en banc*, together with the response in opposition thereto, but without oral argument, have denied rehearing *en banc*.

The above-listed panel, having also considered the suggestion for rehearing pursuant to Rule 151(b), has denied rehearing.

Accordingly, IT IS ORDERED that defendant's motions for rehearing *en banc* under Rule 7(d) and rehearing under Rule 151(b) are denied.

Further, IT IS ORDERED, pursuant to Rule 152(a), that the following correction to the court's opinion of April 18, 1979, be made. The first ten lines in the third full paragraph on page 4 of the slip opinion shall be deleted and the following shall be inserted in lieu thereof:

> The Supreme Court has held in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), that because of the differences in statutory language used, there does not have to be congruence between the scope of the ordinary income tax, on the one hand, and "wages" on the other. Though defendant here derives encouragement from this, it was written there as to a situation where the income tax liability was assumed and defendant wanted the withholdable "wages," there at issue, to conform. The Court pointed out that "wages," the

BY THE COURT *

/s/ Oscar H. Davis
OSCAR H. DAVIS
Judge, Presiding

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* Judge Davis, though voting against rehearing, adheres to the view expressed in his separate opinion concurring in the result.

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

No. 374-75

[Filed July 13, 1979—Court of Claims]

HOTEL CONQUISTADOR, INC., for itself and
as successor by merger to
Tropicana Casino, Inc.

v.

THE UNITED STATES

ORDER

On April 18, 1979, the court rendered an opinion holding that the plaintiff was entitled to recover and entering judgment to that effect. The determination of the amount of recovery was reserved pending further proceedings pursuant to Rule 131(c).

On July 10, 1979, the trial judge of this court filed a memorandum report recommending that, in accordance with the opinion of the court and the stipulation of the parties, judgment be entered for the plaintiff for $26,349.18, which recommendation is adopted by the court.

IT IS THEREFORE ORDERED that judgment be and the same is entered for the plantiff for twenty-

six thousand three hundred forty-nine dollars and eighteen cents ($26,349.18).

BY THE COURT

/s/ Daniel M. Friedman
DANIEL M. FRIEDMAN
Chief Judge

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C. (1970 ed.)):

SEC. 3101. RATE OF TAX.

(a) [as amended by Section 204(a)(1), Act of March 17, 1971, Pub. L. No. 92-5, 85 Stat. 11] *Old-age, survivors, and disability insurance.*

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * *

(3) with respect to wages received during the calendar years 1971 and 1972, the rate shall be 4.6 percent; * * *

* * * * *

SEC. 3121. DEFINITIONS.

(a) [as amended by Section 108(b)(2) of the Social Security Amendments Act of 1967, Pub. L. No. 90-248, 81 Stat. 834] *Wages.*

For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

(1) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to $7,800 with respect to employment has been paid to an individual by an employer

during any calendar year, is paid to such individual by such employer during such calendar year. * * *

* * * * *

SEC. 3301. RATE OF TAX.

[as amended by Section 301(a), Employment Security Amendments Act of 1970, Pub. L. No. 91-373, 84 Stat. 713]

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1970 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

SEC. 3306. DEFINITIONS.

(a) [as amended by Section 101(a) of the Employment Security Amendments Act of 1970, Pub. L. No. 91-373, 84 Stat. 696] *Employer.*

For purposes of this chapter, the term "employer" means, with respect to any calendar year, any person who—

(1) during any calendar quarter in the calendar year or the preceding calendar year paid wages of $1,500 or more, or

(2) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least one individual in employment for some portion of the day.

(b) *Wages.*

For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

> (1) [as amended by Section 302, Employment Security Amendments Act of 1970, Pub. L. No. 91-373, 84 Stat. 695] that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to $4,200 with respect to employment has been paid to an individual by an employer during any calendar year, is paid to such individual by such employer during such calendar year. * * *

* * * * *

Treasury Regulations on Employment Tax (26 C.F.R.):

§ 31.3121(a)-1 *Wages.*

* * * * *

(e) Generally the medium in which the remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, as for example, goods, lodging, food, or clothing. Remuneration paid in items other than cash shall be computed on the basis of the fair value of such items at the time of payment. See, however, §§ 31.3121(a)(7)-1, 31.3121(a)(8)-1, 31.3121(a)(10)-1, and 31.3121(a)(12)-1, relating to the treatment of remuneration paid in any medium other than cash for services not in

the course of the employer's trade or business and for domestic service in a private home of the employer, for agricultural labor, for services performed by certain homeworkers, and as tips, respectively.

(f) Ordinarily, facilities or privileges, (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

* * * * *

§ 31.3306(b)-1 *Wages.*

* * * * *

(e) Except in the case of remuneration paid for services not in the course of the employer's trade or business (see § 31.3306(b)(7)-1), the medium in which the remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, as for example, goods, lodging, food, or clothing. Remuneration paid in items other than cash shall be computed on the basis of the fair value of such items at the time of payments.

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges," however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

(g) Amounts of so-called "vacation allowances" paid to an employee constitute wages. Thus, the salary of an employee on vacation, paid notwithstanding his absence from work, constitutes wages.

* * * * *

APPENDIX E

42 U.S.C. (1970 ed.):

§ 405. *Evidence, procedure, and certification for payments.*

(a) Rules and regulations; procedures.

The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

* * * * *

§ 409. *Definition of wages.*

For the purposes of this subchapter, the term "wages" means remuneration paid prior to 1951 which was wages for the purposes of this subchapter under the law applicable to the payment of such remuneration, and remuneration paid after 1950 for employment, including the cash value of all remuneration paid in any medium other than cash; except that, in the case of remuneration paid after 1950, such term shall not include—

* * * * *

(5) That part of remuneration which, after remuneration (other than remuneration referred to in the succeeding subsections of this section) equal to $7,800 with respect to employ-

ment has been paid to an individual during any calendar year after 1967, is paid to such individual during such calendar year.

* * * * *

§ 1302. *Rules and regulations.*

The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

Social Security Regulations on Federal Old-Age Survivors and Disability Insurance (1950-) (20 C.F.R.):

§ 404.1026(a)(6):

* * * Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges," however, does not ordinarily include the value of meals or lodging furnished to employees. The value of these items is wages where:

(i) It is agreed as part of the contract of employment that the employer is to furnish to

the employee daily meals or regular lodging or both; or

(ii) The value of such items forms an appreciable part of the total remuneration. For example, the value of meals or lodging furnished to hospital, restaurant, or hotel employees or to seamen or other employees aboard vessels, would generally be wages because either one or both of these conditions are met.

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No. 79-742

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

HOTEL CONQUISTADOR, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. a. Respondents concede (Br. in Opp. 12 n.6) that the question whether the value of meals furnished to employees on a daily basis is taxable as "wages" under FICA and FUTA and includable in the identical Social Security Act "wages" benefits base is of "substantial importance." They oppose certiorari, however, on the principal ground that this Court's decision in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), resolved the issue in their favor.

But as we have pointed out in our petition (pages 16-17), *Central Illinois Public Service Co.* does not control this case. That decision addressed the scope of particularized Treasury Regulations (Treasury Regulations on Employment Tax, Section 31.3401(a)-1(b)(2) 26 C.F.R.) that excluded from "wages"—for purposes of income tax withholding—amounts paid to reimburse employees for the cost of meals consumed during non-

overnight travel. There are comparable Regulations excluding such reimbursements from the FICA and FUTA tax base (see 26 C.F.R. 31.3121(a)-1(h) and 31.3306(b)-1(h)). But the question presented in this case—whether the value of meals furnished to employees in non-travel status constitutes "wages" under FICA, FUTA, and the Social Security Act—is governed by an entirely different set of Regulations that unambigiously require the inclusion of such amounts in the tax and benefits base. Indeed, in ruling on the question of the excludability of non-overnight meal reimbursements for purposes of income tax withholding, the Court in *Central Illinois Public Service Co.* explicitly left open the question "whether a new regulation that, for withholding purposes, would require the treatment of lunch reimbursement as wages under the existing statute would or would not be valid" (435 U.S. at 32 n.12). See also 435 U.S. at 38 (Powell, J., concurring). Given the existence of longstanding FICA, FUTA, and Social Security Act Regulations requiring the inclusion of the value of daily meals in the "wages" tax base and the "wages" benefits base, *Central Illinois Public Service Co.* does not decide the issue in this case which affects both employers' taxes and employees' benefits.

b. Apparently recognizing that the issue in this case is governed by Regulations that were not at issue in *Central Illinois Public Service Co.*, respondents attack (Br. in Opp. 12-17) the validity of those Regulations on the ground that the Commissioner's position with respect to the question presented has not been consistent.

But the essential fact that cannot be gainsaid is that since 1940 virtually identical legislative Regulations under the Social Security Act[1] and the Internal Revenue Code[2] have included the value of free meals furnished to restaurant and hotel employees in the FICA and FUTA "wages" tax base and the Social Security Act benefits base. These Regulations must be upheld unless shown to be unreasonable and plainly inconsistent with the statute. *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501 (1948). See also *National Muffler Dealers Association* v. *United States*, 440 U.S. 472, 485-486 (1979). Most of the changes in the Commissioner's position cited by respondents antedated the original 1940 version of these Regulations and are therefore irrelevant; the other rulings which respondent characterizes as inconsistent either involved the wholly different income tax withholding statute or dealt with businesses other than hotels or restaurants. There has been accordingly no variance in the Treasury's position that casts doubt upon the validity of the Regulations.[3]

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[1]Social Security Board Regulations on Federal Old-Age and Survivors Insurance under Title II of the Social Security Act, Section 403.827 (20 C.F.R. (1940 Supp.)); Social Security Board Regulations on Federal Old Age, Survivors and Disability Insurance (1950-), Section 404.1026(a)(5), (6) (20 C.F.R. 1969 ed); Social Security Administration Regulations on Federal Old-Age, Survivors and Disability Insurance (1950-), Section 404.1026(a)(5), (6) (20 C.F.R. (1979 ed.)).

[2]Treasury Regulations 106, Section 402.227 (1940 ed.) (FICA); Treasury Regulations 107, Section 403.227 (1940 ed.) (FUTA); Treasury Regulations 128, Section 408.226 (1951 ed.) (FICA); Sections 31.3121(a)-(e) and (f) (FICA) and 31.3306(b)-1(e) (FUTA) of the Treasury Regulations on Employment Tax (26 C.F.R.).

[3]Nor does the government's position in the Court of Claims in this case evidence the inconsistency that respondents seek to attribute to the Commissioner's treatment of meals for FICA and FUTA tax purposes. Contrary to respondents' contention (Br. in

2. Finally, respondents attempt to refute (Br. in Opp. 8-9) the existence of a conflict between the decision below and *Pacific American Fisheries* v. *United States*, 138 F. 2d 464 (9th Cir. 1943) and *S.S. Kresge Co.* v. *United States*, 379 F. 2d 309 (6th Cir. 1967). But those cases squarely hold that the Regulations which the Court of Claims acknowledged to be controlling (Pet. App. A 15a) but cast aside as a "nearly worthless" "guide to employers" (Pet. App. A 14a)—required the inclusion in the FICA and FUTA tax base of the value of meals furnished to employees. In so ruling, the Ninth and Sixth Circuits specifically rejected the rationale, upon which the decision below rests (Pet. App. A 10a-11a), that meals furnished to employees for the employer's business convenience are not "wages" for purposes of FICA and FUTA (see 138 F. 2d at 465-466; 379 F. 2d at 310). Accord: *S.S. Kresge Co.* v. *United States*, 218 F. Supp. 240, 242-243 (E.D. Mich. 1963).

Opp. 7, 10), the statements in the government's brief in the Court of Claims in this case and in the Fourth Circuit in *Royster* v. *United States*, 479 F. 2d 387 (1973), that the term "wages" has the same meaning under all of the employment tax statutes, were made prior to this Court's decision in *Central Illinois Public Service Co.* on the assumption that the reimbursements for meals consumed during non-overnight travel at issue in that case were not travel expenses. Our point at that time was that because the statutory and regulatory definition of "wages" for purposes of income tax withholding was narrower than under FICA and FUTA, a decision in favor of the government in *Central Illinois Public Service Co.* would have required a similar ruling in the instant case. However, given the basis of this Court's decision in *Central Illinois Public Service Co.* that non-overnight meal reimbursements were travel expenses under the Regulation at issue in that case, it is plain that the statements in the government's briefs cited by respondents do not speak to the question presented here involving meals furnished to employees in non-travel status. (For the convenience of the Court, we are lodging with the Clerk copies of the government's briefs in the Court of Claims in this case and in the Fourth Circuit in *Royster*).

Moreover, just as the meals in *Pacific American Fisheries* and *S.S. Kresge Co.* were a specific element of the employees' compensation (see 138 F. 2d at 465-466; 218 F. Supp. at 244), so too were the meals at isue here. Respondents' labor agreements required them to provide meals to their employees on a daily basis or to pay $1.25 for each meal not furnished (Pet. App. A 3a). Accordingly, the compensatory character of these meals and the conflict of decisions cannot be denied.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979

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